

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
LINCOLN APPLIANCES, INC. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through November 30, 1985. :

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In the Matter of the Petition :  
of :  
STU-GLEN CORP. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through June 30, 1988. :

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In the Matter of the Petition :  
of :  
WILLIAM MLOTOK, OFFICER OF :  
LINCOLN APPLIANCES, INC. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through November 30, 1985. :

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In the Matter of the Petition :  
of :  
WILLIAM MLOTOK, :  
OFFICER OF STU-GLEN CORP. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through June 30, 1988. :

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DETERMINATION  
DTA NOS. 807641,  
807646, 807644,  
807645, 807639,  
807640, 807642  
and 807643



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In the Matter of the Petition :  
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of :  
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STUART A. KAUFER, OFFICER OF :  
LINCOLN APPLIANCES, INC. :  
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for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through November 30, 1985. :  
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OFFICER OF STU-GLEN CORP. :  
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In the Matter of the Petition :  
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of :  
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GLEN LIQUORI, OFFICER OF :  
LINCOLN APPLIANCES, INC. :  
 :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through November 30, 1985. :  
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In the Matter of the Petition :  
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GLEN LIQUORI, :  
OFFICER OF STU-GLEN CORP. :  
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for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1984 :  
through June 30, 1988. :  
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Petitioner Lincoln Appliances, Inc., c/o Edwin A. Bernstein, 66 North Village Avenue, Rockville Centre, New York 11570, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through November 30, 1985.

Petitioner Stu-Glen Corp., c/o Edwin A. Bernstein, 66 North Village Avenue, Rockville Centre, New York 11570, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through June 30, 1988.

Petitioner William Mlotok, officer of Lincoln Appliances, Inc., 17 Hollywood Drive, Plainview, New York 11803, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through November 30, 1985.

Petitioner William Mlotok, officer of Stu-Glen Corp., 17 Hollywood Drive, Plainview, New York 11803, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through June 30, 1988.

Petitioner Stuart A. Kaufer, officer of Lincoln Appliances, Inc., 21 Bedford Avenue, Rockville Centre, New York 11570, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through November 30, 1985.

Petitioner Stuart A. Kaufer, officer of Stu-Glen Corp., 21 Bedford Avenue, Rockville Centre, New York 11570, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through June 30, 1988.

Petitioner Glen Liquori, officer of Lincoln Appliances, Inc., c/o Edwin A. Bernstein, 66 North Village Avenue, Rockville Centre, New York 11570, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for

the period June 1, 1984 through November 30, 1985.

Petitioner Glen Liquori, officer of Stu-Glen Corp., c/o Edwin A. Bernstein, 66 North Village Avenue, Rockville Centre, New York 11570, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through June 30, 1988.

A consolidated hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 22, 1991 at 1:15 P.M., with all briefs to be filed by February 7, 1992. Petitioners William Mlotok and Stuart A. Kaufer appeared pro se. Petitioner Glen Liquori did not appear. While petitioners William Mlotok and Stuart A. Kaufer stated that they were not appearing on behalf of Lincoln Appliances, Inc. and Stu-Glen Corp., it is noted that they challenged the amount of the assessments issued against said corporations and thus will be deemed to have appeared on behalf of the corporations for that purpose. Both were officers of each corporation. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

### ISSUES

I. Whether the auditor properly disallowed nontaxable sales claimed by Lincoln Appliances, Inc. and Stu-Glen Corp.

II. Whether petitioner William Mlotok was a person required to collect tax on behalf of Lincoln Appliances, Inc. and Stu-Glen Corp. and is liable for unpaid sales and use taxes due from said corporations.

### FINDINGS OF FACT

The assessments in this case arose from the audit of two related corporations, Lincoln Appliances, Inc. ("Lincoln") and Stu-Glen Corp. ("Stu-Glen"), which operated a chain of retail and wholesale appliance and electronics stores on Long Island.

Lincoln was incorporated on November 5, 1975, while Stu-Glen was incorporated on October 1, 1976. The chain's first store was a Lincoln Appliance store in Oceanside, New

York. At the beginning of the audit period, the chain operated four stores. Two more stores were added in 1986. Stuart A. Kaufer, who was president of Lincoln and secretary-treasurer of Stu-Glen,<sup>1</sup> testified that the stores opened after the Oceanside store were under the Stu-Glen name. He stated that Lincoln was merged with Stu-Glen at some point, but he did not know exactly when that took place. The auditor determined that Lincoln was a wholly-owned subsidiary of Stu-Glen at the time of the audit.<sup>2</sup>

The corporations filed separate sales and use tax returns for the periods up to and including the quarter ending November 30, 1985 when

Lincoln reported that it was "inactive". The auditor noted that Stu-Glen began reporting all sales after said date.<sup>3</sup>

#### The Lincoln Audit

Upon audit, Lincoln's purchase records were found to be adequate and in substantial agreement with purchases per the Federal income tax returns. Gross sales per records were found to be in substantial agreement with sales reported on the Federal income tax returns and on the sales tax returns. Sales records were found to be inadequate, however, because Lincoln kept no record of actual nontaxable sales made or tax collected. The auditor found that Lincoln's accountant had prepared the sales tax returns from bank statements in conjunction with monthly summary sheets from each store, showing total taxable sales, nontaxable sales and tax due.

The test month of April 1985 was originally chosen, at random, as a test month for

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<sup>1</sup>The corporation franchise tax reports for the years in issue, however, list Stuart Kaufer as president of Stu-Glen.

<sup>2</sup>Exhibit "O", page 8.

<sup>3</sup>Exhibit "O", page 8.

Lincoln's nontaxable sales claimed on its sales tax returns.

Lincoln presented a "stack" of invoices with a tape totalling \$122,982.21, the approximate amount of nontaxable sales claimed for April 1985. The auditor noted that Lincoln kept no record of nontaxable sales other than original invoices. Lincoln's accountant stated that no sales journal or accounts receivable ledger was maintained. An analysis of the invoices disclosed that the invoice dates ranged from January 1985 through April 1985. The accountant explained that Lincoln reported on a cash basis and that all of said invoices must have been paid in April. The accountant was given an opportunity to obtain copies of Lincoln's deposited checks for nontaxable sales from its bank. Six months later, the auditor received checks for four days' deposits, with the explanation that it would be too expensive to obtain copies for the full month.

At this point, the auditor learned that Lincoln and Stu-Glen shared the same bank accounts and could not be tested separately. The accountant was notified that a detailed audit would be performed.

The accountant and an attorney representing the corporation advised the auditor that a detailed audit could not be performed, since all other invoices had been destroyed in floods at the Oceanside store in September 1986 and July 1987 and any records not destroyed in the floods were stolen on July 13, 1987 while they were in a truck which was stolen from a lot at the Melville warehouse. The auditor noted that the accountant had told him on April 21, 1987 that all records were kept in a warehouse in Melville and that is where the records for the April 1985 test had been. Accordingly, on May 18, 1988 a subpoena was issued to Lincoln directing the production of all records; however, no additional records were produced.

On June 21, 1988, the auditor was advised that the business was closed and had been taken over by the bank and creditors.

On June 22, 1987, Lincoln's representative executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1984 through May 31,

1985 to September 20, 1988.

Lincoln was placed in an involuntary Chapter 7 bankruptcy proceeding on or about June 30, 1988.

Lincoln was given credit for proven nontaxable sales and the balance of the claimed nontaxable sales were disallowed. Taxable sales were increased from \$2,566,973.00 to \$6,052,172.00, resulting in a tax deficiency of \$287,528.92.

On July 20, 1988, the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due to Lincoln and to William Mlotok, Stuart A. Kaufer and Glen Liquori, as officers, for the period June 1, 1984 through November 30, 1985, for tax due of \$287,528.92, penalty of \$75,832.43 and interest of \$139,619.12, for a total due of \$502,980.47. On the same date the Division issued separate notices of determination and demands for payment of sales and use taxes due for omnibus penalty of \$7,900.39 for the period June 1, 1985 through November 30, 1985, to Lincoln and the same officers.

#### The Stu-Glen Audit

Upon audit, Stu-Glen's purchases per records were found to be in substantial agreement with purchases per the Federal income tax returns. Gross sales per records were found to be in substantial agreement with sales reported on the Federal income tax returns and on the sales tax returns. Also, bank statements were reconciled to sales tax returns for the quarter ending August 31, 1987.

Stu-Glen's accountant refused to present any records until February 24, 1988, claiming that the Lincoln audit would have to be completed before he would do so. When records were eventually produced, the accountant claimed that Stu-Glen did not maintain sales journals, accounts receivable ledgers or any source documents other than copies of invoices. He claimed that Stu-Glen reported sales on a cash basis.



The accountant was given the opportunity to substantiate nontaxable receipts by obtaining photocopies of checks deposited from the bank; however, he declined, claiming it would be too costly.

A subpoena duces tecum was issued to Stu-Glen on May 18, 1988; however, nothing additional was presented pursuant to the subpoena. Stu-Glen claimed that all invoices for all six stores for the first three years of the audit were destroyed in a flood at the Oceanside store and in a subsequent truck theft.

The auditor noted that Stu-Glen's reported taxable ratio for the first quarter of the audit period was 22% and that this increased to 90% during the course of the audit with no explanation as to the corresponding gradual reduction in nontaxable sales claimed.

The auditor also noted that all six stores had been closed and that it appeared that all inventory had been taken back by the creditors supplying the floorplan financing.

On June 22, 1987, Stu-Glen executed a consent extending the period of limitation for assessment of sales and use taxes due for the period June 1, 1984 through May 31, 1985 to September 20, 1988.

Stu-Glen, like Lincoln, was forced into an involuntary Chapter 7 bankruptcy on or about June 30, 1988.

Reported gross sales were increased from \$76,150,817.00 to \$77,510,133.00, an increase of \$1,359,316.00. There is nothing in the record, however, to explain the basis for this increase. From Exhibit "Q", a schedule of returns filed, it appears that no returns were filed for May and June 1988 and that the sum of \$1,359,315.00 was reported for March and April. It is noted that the increase in gross sales is \$1.00 more than the amount of the gross sales reported for March and April. In the absence of substantiation of sales for resale, all sales were deemed to be taxable. Accordingly, taxable sales were increased from \$45,403,682.00 to

\$77,510,133.00. Tax on increased gross sales was calculated at \$112,143.57 and tax on unsubstantiated exempt sales at \$2,534,939.49, for a total of \$2,647,083.06.

On June 28, 1988 and July 20, 1988, the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due to Stu-Glen and to William Mlotok, Stuart A. Kaufer and Glen Liquori, as officers, for \$2,490,902.86 in tax due, \$673,055.39 in penalty and \$868,244.48 in interest, for a total due of \$4,032,202.73 for the period June 1, 1984 through November 30, 1987<sup>4</sup>. On July 20, 1988, the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due to Stu-Glen and to the three officers for \$156,180.20 in tax, \$11,305.61 in penalty and \$2,184.36 in interest, for a total of \$169,670.17 for the period December 1, 1987 through June 30, 1988. On the same date, additional notices of determination and demands for payment of sales and use taxes due were issued to Stu-Glen and the three officers for \$172,141.82 in omnibus penalty for the period June 1, 1985 through June 30, 1988.

#### Participation of William Mlotok

The corporations were formed by petitioners Stuart A. Kaufer and Glen Liquori. In 1982, petitioner William Mlotok was hired as a salesman in the Oceanside store by Mr. Kaufer and Mr. Liquori. At that time, there was only one other store, located in Great Neck.

In 1983, Mr. Mlotok was manager of the Oceanside store. During that year, the chain opened a third store in Hicksville. The main office was at the Great Neck store where Mr. Liquori was then located. Mr. Kaufer

ran the Hicksville store. At that time, the warehouse was also located in Hicksville.

In 1984, Mr. Kaufer and Mr. Liquori offered Mr. Mlotok the opportunity to purchase 5% of the stock in the two corporations for \$70,000.00. Mr. Mlotok borrowed the money from his parents and bought the stock.

Also in 1984, Mr. Kaufer and Mr. Liquori decided to open a fourth location in

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<sup>4</sup>The notice to Mr. Mlotok is dated June 28, 1988 while the others are dated July 20, 1988.

Farmingdale. Mr. Mlotok was not involved in that decision and, in fact, did not see the location until after the deal was made.

When the Farmingdale location opened, Mr. Kaufer and Mr. Liquori hired a new manager for Oceanside and moved Mr. Mlotok to Farmingdale where he served primarily as warehouse manager and also served as office manager and controller. The warehouse and the office were in the back of the Farmingdale store. Mr. Mlotok did not manage the Farmingdale store itself, as Mr. Liquori was also based at that location. Mr. Mlotok spent most of his time receiving shipments, working out delivery schedules and getting the goods delivered to the stores. He would drive a truck if necessary. In the office he was assigned tasks by Mr. Liquori such as monitoring salesmen's commissions, time scheduling and getting the computer system on line.

Mr. Mlotok could not hire or fire employees without the approval of Mr. Kaufer or Mr. Liquori. If Mr. Mlotok recommended hiring a prospect for the warehouse, Mr. Liquori always conducted a second interview before making a decision.

Mr. Mlotok was an officer of the corporations, although his title is not clear. He signed sales tax returns as vice-president (although some sales tax returns were signed as controller), but was listed on the corporation tax returns as treasurer. Mr. Mlotok testified that he was not sure when he became an officer of the corporations.

Mr. Mlotok never attended any formal shareholders' or directors' meetings. He testified that he did not know if the corporations in fact had boards of directors.

Accounting records were kept by a bookkeeper, an accounts payable clerk and an outside accounting firm. The outside accounting firm prepared all tax returns. Mr. Mlotok signed the tax returns as vice-president or controller on the instructions of Mr. Liquori.

Mr. Mlotok was authorized to sign checks for the corporations but did so only in Mr. Liquori's absence.

Petitioner William Mlotok had no say in what bills were to be paid. Either the bookkeeper or accounts payable clerk would assemble bills and submit them to Mr. Liquori

who would decide which bills were to be paid and when payment was to be made.

Petitioner William Mlotok never received a dividend from the corporations. He received only a straight salary.

In April 1988, when Mr. Mlotok learned of the financial problems of the corporations, he refused to sign any tax returns or checks. He resigned in May 1988.

#### CONCLUSIONS OF LAW

A. Tax Law § 1135 sets forth the recordkeeping requirements of Articles 28 and 29 of the Tax Law. If a vendor is unable to produce the records required to be kept under said section, the Division is authorized by Tax Law § 1138(a)(1) to select a method of audit reasonably calculated to reflect the taxes due. It is then incumbent upon the vendor to show, by clear and convincing evidence, that the method of audit or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451; Matter of Carmine Restaurant, Inc. v. State Tax Commn., 99 AD2d 581, 471 NYS2d 402).

B. The records available for audit here were unquestionably inadequate. The corporations offered little to substantiate nontaxable sales. Also, when the auditor attempted to perform a test period audit for April 1985, the corporations declined to obtain copies of checks for said month on the grounds that it would be too expensive. Since Tax Law § 1132(c) provides that all receipts are presumed taxable until the contrary is established, the auditor was justified in disallowing all nontaxable sales not substantiated by the corporations. It is noted that Tax Law § 1132(c) provides that the burden of proof that any receipt is not taxable is on the person required to collect tax or the customer.

C. One adjustment must be made, however. The assessments attributable to Stu-Glen must be reduced by the taxes, penalty and interest attributable to the increase of gross sales of \$1,359,316.00. There is nothing in the record to show the reason for the increase (see Finding of Fact "22"). It was not explained in the auditor's testimony or in the portions of the audit papers introduced by the Division of Taxation. It is noted that the Division of Taxation

declined to offer the audit worksheets at the hearing.<sup>5</sup>

D. Tax Law § 1133(a) provides, in pertinent part, as follows:

"Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

E. Tax Law § 1131(1) provides, in pertinent part, as follows:

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership<sup>6</sup>."

F. By his credible testimony, petitioner William Mlotok has sustained his burden of proof to show that he was not a person required to collect tax on behalf of Lincoln and Stu-Glen during the periods at issue. While he was an officer and shareholder of the corporations and signed tax returns and checks, his position in the entities was, in reality, a subordinate one. He owned only 5% of the stock and was required to act under the instructions of Mr. Kaufer and Mr. Liquori, who together owned the other 95%. His duties, for most of the audit period, primarily involved managing the warehouse, receiving shipments of merchandise and delivering goods to the stores. Mr. Kaufer and, in particular, Mr. Liquori made the financial decisions for the corporations.

It is noted that while Mr. Mlotok signed sales tax returns, it is not surprising that he could

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<sup>5</sup>When asked by the Administrative Law Judge whether the Division of Taxation would be introducing the audit worksheets, the attorney for the Division replied:

"Which worksheets? I'm presenting my case the way the State chooses to present it. If they want to present some evidence, let them do it." (Transcript, page 48.)

6

The references to director and employees of partnerships and individual proprietorships were added effective September 1, 1985.

not discern the problems which developed with

reporting. The returns, which were prepared by an outside accounting firm, reported the correct gross sales. Moreover, the corporations clearly did have a wholesale business, although they were unable to substantiate actual sales for resale due to lack of records.

G. Petitioner Stuart A. Kaufer offered no evidence to show that he was not a person required to collect tax on behalf of the corporations and is liable for the tax assessed, as reduced by Conclusion of Law "C".

H. Petitioner Glen Liquori failed to appear at the hearing and thus was in default. He is liable for the tax assessed, as reduced by Conclusion of Law "C".

I. The petition of William Mlotok is granted and the notices of determination and demands for payment of sales and use taxes due issued against him on June 28, 1988 and July 20, 1988 are cancelled.

The petitions of Lincoln Appliance, Inc., Stu-Glen Corp., Stuart A. Kaufer and Glen Liquori are granted only to the extent indicated in Conclusion of Law "C" and, except as so granted, are denied and the notices of determination and demands for payment of sales and use taxes due issued against them on July 20, 1988 are otherwise sustained.

DATED: Troy, New York  
September 10, 1992

/s/ Robert F. Mulligan  
ADMINISTRATIVE LAW JUDGE